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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

SAMUEL HANK GREY,

Defendant and Appellant.

B290119

(Los Angeles County
Super. Ct. No. VA143081)

APPEAL from a judgment of the Superior Court of Los Angeles County, Raul A. Sahagun, Judge. Affirmed.

William Paul Melcher, under appointment by the Court of Appeal, for Defendant and Appellant.p

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Following a hung jury, defendant and appellant Samuel Grey was retried and convicted by jury of two counts of second degree robbery with true findings returned on two firearm allegations. The trial court sentenced him to 16 years in state prison for the first robbery and firearm enhancement, plus 10 years for two prior serious felony enhancements, for a total term of 26 years.¹ Grey contends the prosecution committed *Griffin* error by pointing out to the jury during closing argument that Grey chose not to call certain witnesses whose testimony might have been exculpatory. (*Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106].) We disagree and affirm. The principles underlying *Griffin* involve the Fifth Amendment privilege against self-incrimination and do not prohibit a prosecutor from commenting on the lack of testimony of witnesses other than the accused.

PROCEDURAL BACKGROUND

An information charged Grey with two counts of second degree robbery (Pen. Code, § 212.5).² The information further alleged Grey personally used a firearm during the commission of both robberies (§ 12022.53, subd. (b)) and sustained two prior strikes (§§ 667, subd. (d), 1170.12, subd. (b)), two prior serious felony convictions (§ 667, subd. (a)), and two prison prior convictions (§ 667.5, subd. (b)). The jury convicted him of both robbery counts, and he admitted the prior strikes and serious

¹ The court sentenced him to a concurrent term of 16 years for the second robbery and firearm enhancement.

² All further undesignated statutory references are to the Penal Code.

felony convictions.³ The court granted his *Romero* motion and struck one of his prior strikes. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.) On count one, the court sentenced him to 16 years, consisting of a three-year midterm, doubled to six years for his prior strike, plus an additional 10 years for the firearm enhancement. The court also sentenced him to 10 years for the two serious felony priors, for a total term of 26 years.⁴

FACTUAL BACKGROUND

On September 28, 2016, Mudashiru Hassan and his friend Oladipupo Ayodele entered a Western Union location in Bellflower so Hassan could wire some money. They observed Grey at the counter with a woman. Grey looked at Hassan. Hassan reached the teller window, placed about \$4,000 in cash on the counter, and watched as the teller counted it. After a few minutes, the teller told Hassan she was unable to wire the money.

Video footage from the mart where the Western Union was located showed Grey and the woman move toward the exit, where the woman gave a thumbs-up to a man outside in a red shirt driving a car. Grey and the woman left and went around the corner to where the red-shirted man had just driven. Minutes later, Hassan and Ayodele exited the store and got in Hassan's

³ He did not admit, and the court did not sentence him, on the two prior prison term enhancements.

⁴ The court imposed a 16-year concurrent sentence on count 2, consisting of a three-year midterm, doubled to six years for the prior strike, plus 10 years for the firearm enhancement.

car. A car pulled up to the driver's side of Hassan's car. In it were Grey, the man in the red shirt, and the woman who was with Grey in the Western Union. Grey exited the car, approached Hassan's open window, pointed a gun at him and Ayodele, and demanded that they give him their money and phones. He threatened to shoot them if they did not cooperate. They gave Grey three phones and Ayodele's wallet, but Hassan kept his wallet and the \$4,000 in cash. The man in the red shirt approached the car, and Grey handed him the stolen belongings. Grey and the red-shirted man got back in the car and drove away.

Hassan called 911 on a phone he had not given Grey, and police responded to the scene. Hassan and Ayodele described Grey, remembered they had seen him in the Western Union, and suggested the officers look there for video footage. A detective spoke with the Western Union teller who had helped Grey. The teller provided the detective with a copy of Grey's photo identification.

Later that day, Hassan and Ayodele went to the sheriff's station. They were given a standard admonition, shown a six-pack, and identified Grey as the robber. At trial, Hassan and Ayodele identified Grey as the man they saw in line at the Western Union location and who robbed them at gunpoint. Hassan testified the woman in the car was the same woman who was in the Western Union with Grey.

Grey called one witness, an expert in eyewitness identification, who testified regarding cross-racial identification and other factors that decrease the accuracy of eyewitness memory.

During rebuttal closing argument, the prosecution told the jury: “[Y]ou probably would have liked to have heard from the woman and the guy in the red shirt [] It’s not their responsibility to do anything []. I have to prove my case beyond a reasonable doubt. Could have called the woman to say, ‘hey, we just left’ [¶] . . . [¶] There is a lot of things we could have heard, but we didn’t. []”

DISCUSSION

“[T]he Fifth Amendment . . . forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt.” (*Griffin, supra*, 380 U.S. at p. 615.) “[C]omment on the refusal to testify is a remnant of the ‘inquisitorial system of criminal justice’ . . . , which the Fifth Amendment outlaws.” (*Id.* at p. 614, internal citation omitted.) “It is well established, however, that the [*Griffin*] rule . . . does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to *call logical witnesses*.” (*People v. Medina* (1995) 11 Cal.4th 694, 755, italics added.)

Here, we find no *Griffin* error because the prosecution did not comment on Grey’s failure to testify. The prosecution commented on the fact that Grey did not call, as exculpatory witnesses, the woman who was with him in the Western Union and the red-shirted man who was waiting outside for them in the car. These were logical witnesses because their testimony could have bolstered Grey’s defense that he did not commit the robberies. (*Medina, supra*, 11 Cal.4th at p. 755.) Since the prosecution’s comments did not involve Grey’s decision not to

testify, they did not implicate his Fifth Amendment rights, and there was no *Griffin* error.⁵

Even assuming there was error, we find it harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S. Ct. 824, 17 L. Ed. 2d 705].) For *Griffin* error to be prejudicial, the improper comment or instruction must either “serve to fill an evidentiary gap in the prosecution’s case,” or “at least touch a live nerve in the defense” (*People v. Vargas* (1973) 9 Cal.3d 470, 481, internal citations omitted.) Grey’s defense was that he did not commit the robberies. But the identification evidence presented against him was strong. Hassan and Ayodele both identified him as the assailant in a six-pack on the day of the robbery. They also identified him at trial. Under these circumstances, we find no prejudice.

⁵ We also reject Grey’s argument that the prosecution’s comments constituted improper burden shifting. The prosecutor qualified his statement by reminding the jury that the People had the burden of proving Grey’s guilt beyond a reasonable doubt. The court also instructed the jury on the presumption of innocence and the prosecution’s burden of proof. (Calcrim No. 220.)

DISPOSITION

The judgment is affirmed.

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CURREY, J.

WE CONCUR:

MANELLA, P. J.

WILLHITE, J.